

**United States Circuit Court
of Appeals**

for the Ninth Circuit

In the Matter of H. J. BRENEMAN, Bankrupt.
H. J. BRENEMAN,

Petitioner,

vs.

M. F. CORRIGAN, as Trustee in Bankruptcy of the
Estate of H. J. BRENEMAN, Bankrupt,
Respondent.

**MOTION OF RESPONDENT TO DISMISS
PETITION FOR REVISION**

Sidney Teiser, Morgan Bldg., Portland, Oregon,
W. L. Cooper, Chamber of Commerce, Portland, Ore.
Attorneys for the Bankrupt.

Wm. B. Layton, Pittock Block, Portland, Oregon,
Attorney for the Trustee.

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**MOTION TO DISMISS PETITION FOR
REVISION**

United States Circuit Court of Appeals for the
Ninth Circuit.

In the Matter of H. J. BRENEMAN, Bankrupt.

**MOTION OF M. F. CORRIGAN, TRUSTEE AND
RESPONDENT TO DISMISS PETITION
FOR REVISION**

Comes now M. F. Corrigan, Respondent above
named, by his attorney, Wm. B. Layton, and moves

the court for an order dismissing the Petition for a Revision filed herein for the following reasons, to-wit:

I.

Any controversy between the parties hereto has been fully settled and determined since the Order of the Referee and before or during the pendency of these proceedings.

II.

This cause is purely fictitious and there is no real controversy between the parties hereto.

III.

That the Petition for Revision herein has been filed purely for the purposes of delay.

In support of the foregoing motion respondent will rely upon the affidavit of M. F. Corrigan, the records and files of the Circuit Court of the State of Oregon, for Yamhill County, in the case of D. M. Nayberger, plaintiff, vs. H. J. Breneman and Edith Breneman, his wife, defendants, which are hereto attached and marked "Exhibits 1 to 14" inclusive and by reference made part and portion hereof.

.....*Wm. B. Layton*.....

Attorney for Respondent.

EXHIBIT 1

AFFIDAVIT OF M. F. CORRIGAN IN SUPPORT
OF MOTION TO DISMISS PETITION FOR
REVISION.

United States of America,
State of Oregon,
County of Multnomah,—ss.

I, M. F. Corrigan, being first duly sworn, depose and say that I am the duly elected, qualified and acting trustee of the estate of H. J. Breneman, Bankrupt; that I am also the duly elected, qualified and acting trustee of the estate of Edith Breneman, bankrupt and wife of H. J. Breneman, bankrupt; that I was elected Trustee of the Estate of H. J. Breneman, bankrupt, on the 11th day of October, 1921, and of the estate of Edith Breneman, Bankrupt, on the 28th day of July, 1922;

That said bankrupts refused to surrender to me possession of the real property described in the petition of H. J. Breneman for adjudication in bankruptcy, and by order of the Referee before whom said proceedings were pending, and by affirmance thereof by the District Court of the United States for the District of Oregon, on the 30th day of April, 1923, I was adjudged to be entitled to possession of said real estate; that in the latter part of the year 1922 the bankrupt and his family abandoned said property, having moved off of said property on or about the 6th day of April, 1922, to Salem, Oregon, and his wife, Edith Breneman,

having moved off of said property on or about the 15th day of April, 1922, and having taken all of their personal property and belongings off of said property on or about the first day of June, 1924, and ever since the Fall of 1922 the bankrupt and his family have made their homes elsewhere and have failed to maintain said property since said time as a home; that said property is in a badly run down and neglected condition and the house thereon is in need of repairs to make it habitable, and the grounds are in need of cultivation, and since the bankrupts have abandoned said property they have made no effort to care for said property, or to otherwise protect the same. Taxes have been allowed to accumulate against said property for the years 1921, 1922 and 1923, and the 1924 taxes will be due in April, 1925; that the taxes for said years, in accordance with the tax rolls of Yamhill County which have been examined by your affiant, are as follows:

For the year 1921.....	\$ 99.34
For the year 1922.....	151.89
For the year 1923.....	163.40
	<hr/>
Making a total of.....	\$414.63

exclusive of interest and penalties which your affiant estimates to be \$61.01, and for the year 1921 the property has been sold for taxes and certificates of delinquency therefor have been issued;

That your affiant in order to protect the inter-

ests of this estate, and from his own funds, advanced sufficient to take care of one-half of the taxes for 1923, when deed from D. M. Nayberger to said property was given to your affiant as hereinafter referred to;

That the debts of H. J. Breneman, as disclosed to your affiant from said bankruptcy proceedings amount to \$4,059.00 and your affiant as trustee of the estate of H. J. Breneman, aside and apart from the real estate hereinbefore referred to, and from all the other assets of said H. J. Breneman at the time of bankruptcy, has been able to realize but the sum of \$986.50, and has had to pay during the course of the administration of said estate for expense of administration the sum of \$228.20, which amount is exclusive of all attorney fees, trustee's and referee's commissions and expenses of this review;

That at the time of the making of the order of the Referee permitting the property to be sold free of liens and denying the claim of H. J. Breneman for homestead exemption, it was stated in open court that one D. M. Nayberger on a debt contracted by the husband and the wife and for which they were jointly liable, had obtained a judgment in the Circuit Court of Yamhill County against said husband and wife, and each of them, for the sum of \$695.99, with interest at the rate of 6 per cent per annum from the 3rd day of June, 1922, and costs and disbursements amounting to \$21.30, and which judgment was entered on

the 17th of June, 1922, in the Circuit Court of the State of Oregon, for the County of Yamhill, and that the real property described herein had been sold for the satisfaction of said judgment, and the property had been purchased by D. M. Nayberger, and the sale thereof was duly confirmed to D. M. Nayberger by order of the Circuit Court of the State of Oregon, for Yamhill County, on the 10th day of February, 1923, and that the year in which said property might be redeemed from said judgment was about to elapse. The Referee made his certain order at said time authorizing your affiant from his own funds to purchase said property or otherwise acquire title thereto. Said bankrupts and each of them failed, neglected and refused to redeem said property from said judgment sale, and on the 13th day of February, 1924, F. B. Ferguson, as Sheriff of the County of Yamhill, State of Oregon, made, executed and delivered to said D. M. Nayberger his certain sheriff's deed for said property;

That thereafter your affiant secured from D. M. Nayberger and Gertrude D. Nayberger, his wife, their certain deed conveying to your affiant said property, and your affiant in order to protect the interests of creditors of said estates in said property, and in order to acquire title thereto, and upon the refusal of the bankrupts, or either of them, to act in the premises, advanced from his own funds and in addition to the other amounts named herein, and paid to D. M. Nayberger and wife the amount

of said judgment and interest and costs for said property, and your affiant has been ever since and is now the holder of the title to said property.

Further deponent sayeth not.

M. J. Corrigan.....

Subscribed and sworn to before me this *14* day of *October*, 192*4*.

N. Kay Alber.....

Notary Public for Oregon.

My commission expires *August 7 1925*

EXHIBIT II—COMPLAINT

In the Circuit Court of the State of Oregon for Yamhill County.

D. M. NAYBERGER, Plaintiff, vs. HARRY J. BRENEMAN and EDITH BRENEMAN, his wife, Defendants.

For cause of action herein, Plaintiff complains and alleges:

I.

That at all the times hereinafter mentioned the above named defendants were, ever since have been, and now are lawful husband and wife, and as such husband and wife have at all the times hereinafter mentioned occupied and maintained, and now do occupy and maintain a home and household in Yamhill County, Oregon.

II.

That at all the times hereinafter mentioned the above named plaintiff was, ever since has been, and now is engaged in the Dry Goods Business at McMinnville, in Yamhill County, Oregon.

III.

That between the 1st day of September, 1919, and the 17th day of July, 1921, the said Plaintiff at McMinnville, Yamhill County, Oregon, at the special instance and request of the said defendants, sold and delivered to the said defendants certain goods, wares, and merchandise, to-wit: Certain clothes, shoes, thread, buttons, gloves, handkerchiefs, ties, boots, pins, dress goods, and dry goods of various kinds.

IV.

That each and all and every of said goods, wares and merchandise so sold and delivered to defendants by the Plaintiff were and are a family necessity, and were and are used by the said defendants for family use.

V.

That the same are worth the reasonable value of \$989.39.

VI.

That the same has not been paid, nor any part thereof, excepting the sum of \$293.40 in cash and credit paid and applied thereon.

VII.

That the said defendants are Tenants by the Entirety in and to the following described real premises, to-wit:

Situate in Yamhill County, and State of Oregon, to-wit: Commencing at a point 22.785 chains west of the Southeast corner of the S. F. Staggs and Minerva J. Staggs D. L. C., Not. No. 1211, Claim No. 55 in T. 4, S. R. 4 W. of the Will. Mer. and running thence West 7.51 chains; thence North 13 1-3 chains; thence East 7.51 chains; thence South 13 1-3 chains to the place of beginning and containing 10 acres.

ALSO: The West half of the "South Park Subdivision," the same being a subdivision in the above named and numbered D. L. C. of S. F. Staggs and wife, containing 12½ acres of land, as the same appears upon the duly recorded plat of said subdivision now of record in the office of the Recorder of Conveyances in and for said County and State.

WHEREFORE, Plaintiff demands judgment against the defendants for the sum of \$695.99, together with the costs and disbursements of this action, and that the interest of said defendants in said land be sold to satisfy such judgment.

VINTON AND TOOZE,

Attorneys for the Plaintiff.

State of Oregon,
County of Yamhill,—ss.

I, D. M. Nayberger, being first duly sworn, say,

that I am plaintiff in the above entitled action and that the facts set forth in the foregoing complaint are true, as I verily believe.

D. M. NAYBERGER.

Subscribed and sworn to before me this 19th day of October, 1921.

LAMAR TOOZE,

[Seal]

Notary Public for Oregon.

My commission expires Sept. 25, 1925.

Filed October 19, 1921. C. B. Wilson, Clerk. By Arta B. Hayes, Deputy.

EXHIBIT III.

SHERIFF'S RETURN ON ATTACHMENT

In the Circuit Court of the State of Oregon, for Yamhill County

D. M. NAYBERGER, Plaintiff, vs. HARRY J. BRENEMAN and EDITH BRENEMAN, his wife, Defendants.

State of Oregon,
County of Yamhill,—ss.

I, F. B. Ferguson, Sheriff of Yamhill County, do hereby certify that by virtue of a Writ of Attachment issued out of the Circuit Court of the State of Oregon, for Yamhill County, upon the 19th day of October, A. D. 1921, in a cause therein pending, wherein D. M. Nayberger is Plaintiff, and Harry J. Breneman and Edith Breneman, his wife, are

Defendants, said Writ being in favor of said Plaintiff and against the property of said Defendants, and directed to me the said Sheriff of Yamhill County, I did, on the 19th day of October, A. D. 1921, at the instance of the above-named Plaintiff attach the following described real property of the within-named Defendants, to-wit: All of the right, title and interest of the defendants, Harry J. Breneman and Edith Breneman, his wife, in and to the following described real property, to-wit:

Situate in Yamhill County, and State of Oregon, to-wit:

Commencing at a point 22.785 chains West of the Southeast corner of the S. F. Staggs and Minerva J. Staggs D. L. C. Not. No. 1211, Claim No. 55 in T. 4, S. R. 4 W. of the Will. Mer. and running thence West 7.51 chains; thence North 13 1-3 chains; thence East 7.51 chains; thence South 13 1-3 chains to the place of beginning and containing 10 acres.

Also, the West half of the "South Park Sub-division" the same being a sub division, in the above named and numbered D. L. C. of S. F. Staggs and wife containing 12½ acres of land, as the same appears upon the duly recorded plat of said sub-division now of record in the office of the Recorder of Conveyances in and for said County and State.

In witness whereof, I have hereunto set my hand,

this 19th day of October, A. D. 1921, at 1:30 o'clock P. M.

F. B. FERGUSON,

Sheriff Yamhill County.

By C. L. Sherwood, Deputy.

Filed October 19, 1921. C. B. Wilson, Clerk. By Arta B. Hayes, Deputy.

Recorded Vol. 5, page 144, Certificate of Attachment, Record for Yamhill County, Oregon.

EXHIBIT IV.

DEFENDANT'S PLEA IN ABATEMENT

In the Circuit Court of the State of Oregon for the County of Yamhill.

D. M. NAYBERGER, Plaintiff, vs. HARRY J. BRENEMAN and EDITH BRENEMAN, his wife, Defendants.

Comes now the defendants above named, and show to the court that Harry J. Breneman, one of the defendants above named, did on the 22nd day of September, 1921, file his petition in bankruptcy, and that on the same day he was adjudged a bankrupt in the United States District Court for the District of Oregon.

That in the defendant Harry J. Breneman's petition he duly and regularly scheduled a list of all his creditors and specially listed the Plaintiff's claim as one of his creditors; that thereafter and before the commencement of this action, the plain-

tiff above named was duly and regularly notified that this defendant has been adjudged a bankrupt, and the plaintiff was also notified of the time and place set for the hearing of the first meeting of the creditors, which was long prior to the commencement of this action, and that Mr. Vinton, one of the attorneys for the plaintiff, long before the commencement of this action attended the first meeting of the creditors and well knew that the defendant Harry J. Breneman was adjudged a bankrupt at the time of the commencement of this action.

WHEREFORE, the defendants pray that all proceedings on the part of the plaintiff be abated, and that he be estopped from in any way prosecuting any matters or things set out in his complaint filed herein, and that all demands, notices and other proceedings had or filed in this action against the defendants be abated until the final adjudication of the bankrupt proceedings, and that upon the defendant Harry J. Breneman's final discharge he recover his costs and disbursements from the Plaintiff herein.

W. J. MAKELIN,

Attorney for the Defendants.

State of Oregon,

County of Multnomah,—ss.

I, Harry J. Breneman, being first duly sworn, depose and say that I am one of the defendants in the above entitled cause; and that the foregoing plea in abatement is true, as I verily believe.

HARRY J. BRENEMAN

Subscribed and sworn to before me this 27th day of October, 1921.

W. J. MAKELIM,
[Seal] Notary Public for the State of Oregon.
My commission expires August 25, 1923.

State of Oregon,
County of Multnomah,—ss.

Due service of the within plea is hereby accepted in Yamhill County, Oregon, this 28th day of October, by receiving a copy thereof, duly certified to as such by W. J. Makelim.

Attorneys for the defendants.

W. T. VINTON,
Attorney for Plaintiff.

Filed October 28, 1921. C. B. Wilson, Clerk. By Arta B. Hayes, Deputy.

EXHIBIT V.

PLAINTIFF'S DEMURRER TO PLEA IN ABATEMENT.

In the Circuit Court of the State of Oregon for the
County of Yamhill.

D. M. NAYBERGER, Plaintiff, vs. HARRY J.
BRENEMAN and EDITH BRENEMAN, his
wife, Defendants.

Comes now the plaintiff above named appearing by his attorneys, Vinton and Tooze, and demurs to the defendants' plea in Abatement herein for the

reason that it appears on the face thereof that the same does not state facts sufficient to constitute a defense to the Plaintiff's complaint herein.

VINTON AND TOOZE,
Attorneys for Plaintiff.

Filed November 12, 1921. C. B. Wilson, Clerk.

EXHIBIT VI.

ORDER SUSTAINING DEMURRER

D. M. NAYBERGER, Plaintiff, vs. HARRY J. BRENEMAN and EDITH BRENEMAN, his wife, Defendants,—MAY 18TH, 1922.

This cause having been heretofore argued and submitted to the Court upon the Plaintiff's demurrer to the defendants plea in abatement heretofore filed herein the Plaintiff appearing by Vinton and Tooze, his attorneys, and the defendants appearing by their counsel of record herein and the matter having been by the court taken under advisement and the court having given the said demurrer due consideration and being now fully advised in the premises:

It is ordered by the court that the said Demurrer be and the same is hereby sustained, and it is further ordered by the court that the said defendants be and they are hereby granted and allowed until and including the 28th day of May, 1922, in which to prepare, serve and file answer herein.

Recorded Vol. 15, page 121, Circuit Court Journal for Yamhill County, Oregon.

EXHIBIT VII.

ORDER ENTERING DEFAULT OF DEFENDANTS.

In the Circuit Court of the State of Oregon for the
County of Yamhill.

D. M. NAYBERGER, Plaintiff, vs. HARRY J.
BRENEMAN and EDITH BRENEMAN, his
wife, Defendants.

Now on this 3rd day of June, 1922, comes the above named plaintiff, D. M. Nayberger, appearing by his attorneys, Vinton & Tooze, and applies to the Court for a judgment by Default against the above named defendants, Harry J. Breneman and Edith Breneman, his wife.

And it appearing to the court and the court finds that on the 19th day of October, 1921, F. B. Ferguson, Sheriff of Yamhill County, Oregon, duly, regularly and personally served with summons herein the above named defendants, Harry J. Breneman and Edith Breneman, his wife, in Yamhill County, Oregon, by personally delivering to the said defendants and each of them a copy of the original summons herein prepared and certified to by F. B. Ferguson, Sheriff of Yamhill County Oregon, together with a copy of the original complaint herein prepared and certified to by Lamar Tooze, one of the attorneys for the Plaintiff.

And it further appearing to the court and the court finds that on the 28th day of October, 1921, the defendants filed herein their Plea in Abatement

to the Plaintiff's complaint and that on the 12th day of November, 1921, the above named Plaintiff filed herein his Demurrer to the said Defendants' Plea in Abatement.

And it further appearing to the Court and the Court finds that on the 18th day of May, 1922, the said cause having been theretofore argued and submitted to the Court upon the said Plaintiff's Demurrer to the Defendants' said plea in Abatement in the above entitled court, the court ordered that the said Demurrer be and the same thereby was by the said order, sustained.

And it was further ordered by the Court that the said defendants be and they thereby were, by the said Order, granted and allowed until and including the 28th day of May, 1922, in which to prepare serve and file their answer herein.

And it appearing to the Court that the said defendants were duly and regularly notified of the said Order of this court, to-wit, of the 18th day of May, 1922, wherein and whereby the said Plaintiff's Demurrer to said defendant's plea in Abatement was sustained and the said defendants were granted until and including the 28th day of May, 1922, in which to prepare, serve and file their answer herein.

And it further appearing to the Court that the said Defendants have wholly failed to answer or to otherwise plead or appear herein, and that the time for answering, to-wit, the 28th day of May, 1922, granted in the said Order, dated the 18th day

of May, 1922, has long since expired, and being in default,

It is therefore considered, ordered and adjudged by the Court that the default of the said defendants and each of them be and the same hereby is entered herein in accordance with law.

H. H. BELT,

Judge of the Above Entitled Court.

Recorded Vol. 15, page 128, Circuit Court Journal for Yamhill County, Oregon.

EXHIBIT VIII.

JUDGMENT IN FAVOR OF NAYBERGER

In the Circuit Court of the State of Oregon for the County of Yamhill.

D. M. NAYBERGER, Plaintiff, vs. HARRY J. BRENEMAN and EDITH BRENEMAN, his wife, Defendants.

Now on this 3rd day of June, 1922, this cause coming on regularly to be heard, the Plaintiff appearing by his attorneys, Vinton & Tooze, and applies to the court for a judgment by default against the above named defendants,

And it appearing to the Court and the Court finds that the said defendants and each of them are in default and that the said default of the said defendants and each of them has been heretofore entered herein in accordance with law.

It is therefore considered, ordered and adjudged

by the Court that the said Plaintiff have and recover of and from the defendants and each of them the sum of \$695.99 together with interest on the said sum of \$695.99 from and after the 3rd day of June, 1922, at the rate of six per cent per annum and for Plaintiff's costs and disbursements in this action taxed at Twenty-one and 30-100 (\$21.30) Dollars.

And it further appearing to the court that F. B. Ferguson, Sheriff of Yamhill County, Oregon, did on the 19th day of October, 1922, in pursuance of a Writ of Attachment issued out of the above entitled court and dated the 19th day of October, 1921, duly and regularly attach and levy upon the following described premises, to-wit:

Situate in Yamhill County, and State of Oregon, to-wit:

Commencing at a point 22.785 chains West of the Southeast corner of the S. F. Staggs and Minerva J. Staggs D. L. C. Not. No. 1211, Claim No. 55 in T. 4, S. R. 4 W. of the Will. Mer., and running thence West 7.51 chains; thence North 13 1-3 chains; thence East 7.51 chains; thence South 13 1-3 chains to the place of beginning, and containing 10 acres.

Also: The West Half of the "South Park Subdivision" the same being a subdivision in the above named and numbered D. L. C. of S. F. Staggs and wife, containing 12½ acres of land, as the same appears upon the duly recorded plat of said subdivision now of record in the office of the Recorder of

Conveyances in and for said County and State.

That the said Sheriff, F. B. Ferguson, did on the 19th day of October, 1921, file herein his Certificate of Attachment in the above entitled cause wherein he certified that he had attached the above described real premises under and by virtue of said Writ of Attachment.

It is therefore considered, ordered and adjudged by the Court that the said Sheriff, F. B. Ferguson, of Yamhill County, Oregon, be and he hereby is ordered, directed and empowered and authorized to sell all of the right, title and interest which the said defendants, Harry J. Breneman and Edith Breneman, his wife, had in the above described real premises on the 19th day of October, 1921, and since said date to satisfy the Plaintiff's demands in the manner and form governing the sales of real property on execution and to apply the proceeds of the said sale to the satisfaction of the judgment of the Plaintiff, D. M. Nayberger, against the said defendants hereinbefore set forth, and if there be any property or proceeds remaining after satisfying the said execution, the said Sheriff is directed, ordered, empowered and authorized, upon demand, to deliver the same to the said defendants.

H. H. BELT,

Judge of the Above Entitled Court.

Recorded Vo. 15, page 129, Circuit Court Journal for Yamhill County, Oregon.

Filed June 17, 1922. C. B. Wilson, Clerk. By Arta B. Harding, Deputy.

EXHIBIT IX.

SHERIFF'S RETURN OF SALE OF REAL PROPERTY.

In the Circuit Court of the State of Oregon, for
the County of Yamhill.

D. M. NAYBERGER, Plaintiff, vs. HARRY J.
BRENEMAN and EDITH BRENEMAN, his
wife, Defendants.

State of Oregon,
County of Yamhill,—ss.

I. F. B. Ferguson, Sheriff of Yamhill County, Oregon, do hereby certify that by virtue of an execution and order of sale of real property issued out of the Circuit Court of the State of Oregon, for the County of Yamhill, under the seal of said court bearing date June 28th, 1922, to me directed and delivered on said day, upon and to enforce a certain judgment and order for the sale of real property entered in said court on the 3rd day of June, 1922 in favor of D. M. Nayberger, as Plaintiff, and against Harry J. Breneman and Edith Breneman, his wife, as defendants, and which said writ of execution and order of sale was received by me on the said 28th day of June, 1922, I did in obedience to the commands of said writ of execution, duly levy the same on all of the said defendants' interest of, in or to the following described real property situated, lying and being in Yamhill County, State of Oregon, and described as follows, to-wit:

Commencing at a point 22.785 chains West of the

Southeast corner of the S. F. Staggs and Minerva J. Staggs D. L. C. Not. No. 1211, Claim No. 55 in T. 4, S. R. 4 W. of the Will. Mer., and running thence West 7.51 chains; thence North 13 1-3 chains; thence East 7.51 chains; thence south 13 1-3 chains to the place of beginning, and containing 10 acres.

Also: The West half of the "South Park Sub-division," the same being a subdivision in the above named and numbered D. L. C. of S. F. Staggs and wife containing 12 $\frac{1}{2}$ acres of land, as the same appears upon the duly recorded plat of said Subdivision now of record in the office of the Recorder of Conveyances in and for said County and State.

I do further certify that I duly advertised the said real property for sale as by law required and provided, by publishing a notice of the sale of said real property in the News Reporter, a newspaper published weekly at McMinnville, in Yamhill County, Oregon, and having a general circulation, for four consecutive weeks prior to August 7th, 1922, the date fixed for said sale, commencing with the issue of said paper of date July 6th, 1922, and ending with the issue thereof of date August 3rd, 1922, as shown by the affidavit of Edgar Meresse, the printer of said paper, hereto attached, and a copy of said notice so published being annexed to the said affidavit, which said notice particularly described said real property and stated that the same would be sold by me at the West and front door of the county court House at McMinnville, Oregon, on

Monday, the 7th day of August, 1922, at the hour of ten o'clock in the forenoon of said day, and by also posting copies of said notice in three public places in said Yamhill County, Oregon, to-wit: One of said notices was so posted upon the bulletin board at the front door of the court house in McMinnville, Oregon; one at the front door of the garage of Henderson & Houser on Bridge Street in Sheridan, Oregon, and the third notice upon the front of the garage of Calkins & Son on First Street, in Newberg, Oregon, all of said notices being so posted in public places in Yamhill County, Oregon, and for four weeks immediately prior to the said 7th day of August, 1922.

I do further certify that on the 7th day of August, 1922, at the hour of ten o'clock in the forenoon of said day, being the time so fixed for said sale, I attended at the West door of the county court house in McMinnville, in Yamhill County, Oregon, and offered and exposed said real property for sale in one parcel at public auction, according to law, and for want of bidders, and by public proclamation, I continued the said sale for one week, or until Monday, the 14th day of August, 1922, at ten o'clock in the forenoon of said day, at the same place, and on the said 14th day of August, 1922, at ten o'clock in the forenoon I again attended the place so fixed for said sale by said continuation, and for want of bidders then present, and by public proclamation, I further continued the sale of said real property until Monday, the 21st day of August, 1922, at the

hour of ten o'clock in the forenoon of said day, and on the 21st day of August, 1922, at ten o'clock in the forenoon of said day I attended at the place so fixed for the sale of said real property, and for want of bidders, and by public proclamation I again further continued the sale of said real property until Monday the 28th day of August, 1922, at the hour of ten o'clock in the forenoon of said day, and on the said 28th day of August, 1922, at ten o'clock in the forenoon of said day, I again attended the place so fixed for the sale of said real property and to which such sale had been so continued, to-wit: at the West and front door of the County Court House in McMinnville, Yamhill County, Oregon, and again offered the said real property for sale, at public auction, according to law, when the said Plaintiff, D. M. Nayberger was the highest and best bidder therefore, I did sell, at public auction, the above described real property to the said D. M. Nayberger for the sum of \$739.15, the said named sum being the highest and best sum bidden therefor, which I acknowledged to have received from the said D. M. Nayberger, and that I delivered to the purchaser a certificate of said sale, containing a description of said property, and stating the amount bidden for the said real property and the whole price paid, and that said real property was subject to redemption according to law.

That prior to making said sale, to-wit: on the 28th day of July, 1922, Harry J. Breneman, one of the defendants in said action, served upon me his

certain written demand claiming the said real property as his homestead, and claiming the same to be exempt from such execution sale, the said notice so served upon me by the said defendant, Harry J. Breneman, is hereto attached, marked "Exhibit A," and made a part of this my return.

I hereby return said execution, having received thereon by bid of the said Plaintiff and Execution creditor, D. M. Nayberger, the sum of \$739.15 which said sum has been applied in payment of said judgment as follows: Face of Judgment, \$695.99; interest accumulated thereon, \$9.86; costs and disbursements taxed at the time of entering judgment \$21.30, and publishing notice of sale, \$12.00, and I hereby return said execution satisfied in full.

Dated this 28th day of August, 1922.

F. B. FERGUSON,
Sheriff of Yamhill County, Oregon.

EXHIBIT X.

NOTICE OF SHERIFF'S SALE ON EXECUTION
In the Circuit Court of the State of Oregon for
Yamhill County.

D. M. NAYBERGER, Plaintiff, vs. HARRY J.
BRENEMAN and EDITH BRENEMAN, his
wife, Defendants.

By virtue of an execution, judgment order and order of sale issued out of the above entitled Court, in the above entitled cause, to me directed and

dated the 28th day of June, 1922, based upon a judgment rendered in the above entitled court on the 3rd day of June, 1922, and entered in the above entitled court on the 19th day of June, 1922, in favor of the above named Plaintiff, D. M. Nayerger, and against the above named defendants, Harry J. Breneman and Edith Breneman, his wife, and each of them for the sum of \$695.99, together with interest on said sum of \$695.99 from and after the 3rd day of June, 1922, at the rate of six per cent per annum, and for Plaintiff's costs and disbursements taxed and allowed at \$21.30 and the costs of and upon this writ and execution, and commanding me to make sale of the following described real estate, to-wit:

Situate in Yamhill County, and State of Oregon, to-wit: Commencing at a point 22.785 chains West of the southeast corner of the S. F. Staggs and Minerva J. Staggs D. L. C. Not. No. 1211, Claim No. 55 in T. 4, S. R. 4 W. of the Will. Mer. and running thence West 7.51 chains; thence North 13 1-3 chains; thence East 7.51 chains; thence South 13 1-3 chains to the place of beginning and containing 10 acres.

Also: The West half of the "South Park Sub-division," the same being a subdivision in the above named and numbered D. L. C. of S. F. Staggs and wife, containing 12½ acres of land, as the same appears upon the duly recorded plat of said subdivision now of record in the office of the Recorder of Conveyances in and for said county and state,

to satisfy said judgment and all costs and accruing costs.

Now, therefore, I, F. B. Ferguson, Sheriff of Yamhill County, Oregon, will on Monday, the 7th day of August, 1922, at the hour of 10:00 o'clock in the forenoon of said day, at the West and front door of the county court house at McMinnville, in Yamhill County, Oregon, sell at public auction (subject to redemption) to the highest bidder for cash in hand, all of the right, title and interest which the above named defendants, either or both of them had in the above described real premises on the 19th day of October, 1921, or at any time since said date, to satisfy said execution and judgment order, and for all interest, costs and disbursements and accruing costs.

Dated this 28th day of June, 1922.

F. B. FERGUSON,

Sheriff of Yamhill County, Oregon.

First Publication: July 6, 1922.

Last Publication: August 3, 1922.

EXHIBIT XI.

AFFIDAVIT OF PRINTER

State of Oregon,
County of Yamhill,—ss.

I, Edgar Meresse, being first duly sworn, say: That I am the publisher and printer of the News-Reporter, a weekly newspaper published weekly at McMinnville, in Yamhill County, Oregon, and of

general circulation that said newspaper is made up of eight pages of six columns each and with type matter of a depth of 19½ inches; that said newspaper has more than 200 bona fide subscribers living within said county, and has been established and regularly and uninterruptedly published in said county at least once a week during the period of more than twelve consecutive months immediately preceding the first publication of the Notice of Sheriff's sale on execution, a copy of which is hereto attached and made a part hereof, and which was published in said newspaper once each week for five consecutive and successive weeks, the first publication thereof being on the 6th day of July, 1922, and the last on the 3rd day of August, 1922; that the fee actually charged for such publication is \$12.00.

EDGAR MERESSE.

Subscribed and sworn to before me this 28th day of August, 1922.

W. T. VINTON,

[Seal]

Notary Public for Oregon.

My commission expires Aug. 24, 1924.

EXHIBIT XII.

Also EXHIBIT A, SHERIFF'S RETURN

KNOW ALL MEN BY THESE PRESENTS, I, Harry J. Breneman, state that I am a resident and inhabitant of Yamhill County, State of Oregon, and that I am the head of a family, and that my pres-

ent postoffice address is Salem, Oregon, care of Oregon Hospital; and that I claim the following described real estate as my homestead, to-wit:

Commencing at a point 22.785 chains West of the Southeast corner of the S. F. Staggs and Minerva J. Staggs D. L. C. Not. No. 1211, claim No. 55 in T. 4, S. R. 4 W. of the Willamette Meridian; and running thence West 7.51 chains; thence North 13 1-3 chains; thence East 7.51 chains; thence South 13 1-3 chains to the place of beginning, and containing 10 acres,

Also: The West half of the "South Park Sub-division" the same being a sub-division in the above named and numbered D. L. C. of S. F. Staggs and wife, containing 12½ acres of land, as the same appears upon the duly recorded plat of said sub-division now of record in the office of the Recorder of Conveyances in and for said county and State.

That the deed to said property is in the name of Harry J. Breneman and Edith Breneman, husband and wife, and that there is a contract or a life estate in said property held by John F. Allison, who is sixty-eight years of age, and his expectancy according to the mortality table is 9.48, and that according to his contract he is entitled to \$265.14 per year, making it almost impossible to ascertain the true value of said property, but that the same is valued at about seven thousand (\$7,000.00) Dollars, and that the interest is held by Edith Breneman and myself, and that my interest therein does not exceed the sum of Three Thousand (\$3,000.00) Dol-

lars, and that I claim all of said property as a home-
stead.

In witness whereof I have hereunto set my hand
to this instrument on the 28th day of July, 1922.

HARRY J. BRENEMAN.

Executed in the presence of:

W. L. Cooper

J. Roy Mayson

State of Oregon,
County of Multnomah,—ss.

This certifies, that on this 28th day of July, 1922,
before me, a Notary Public within and for the said
county and state, personally appeared Harry J.
Breneman known to me to be the individual de-
scribed in, and who executed the within instrument,
and to me acknowledged that he executed the same
freely and voluntarily.

In witness whereof, I have hereunto set my hand
and affixed my Notarial Seal the day and year in
this certificate written.

W. L. COOPER,

[Seal]

Notary Public for Oregon.

My commission expires 6-18-24.

EXHIBIT XIII.

ORDER OF CONFIRMATION OF SALE.

In the Circuit Court of the State of Oregon for
Yamhill County.

D. M. NAYBERGER, Plaintiff, vs. HARRY J. BRENEMAN and EDITH BRENEMAN, his wife, Defendants.

Now at this time the plaintiff by S. J. Bischoff and Beach & Simon, his attorneys, and asks the court for an order confirming the sale of the following described real property situated in Yamhill County, Oregon, to-wit:

Commencing at a point 22.785 chains West of the Southeast corner of the S. F. Staggs and Minerva J. Staggs D. L. C. Not. No. 1211, Claim No. 55 in T. 4, S. R. 4 W. of Will. Mer., and running thence West 7.51 chains; thence North 13 1-3 chains; thence East 7.51 chains; thence South 13 1-3 chains to the place of beginning and containing 10 acres, all in Yamhill County, State of Oregon.

Also: The West half of the "South Park Sub-division," the same being a sub-division in the above named and numbered D. L. C. of S. R. Staggs and wife, containing 12½ acres of land, as the same appears upon the duly recorded plat of said subdivision now of record in the office of the Recorder of Conveyances in and for said Yamhill County, State of Oregon.

And it appearing to the court that on June 17, 1922, a judgment was filed and docketed in the office of the County Clerk of Yamhill County, Oregon, in favor of the plaintiff and against the defendants, wherein and whereby it was ordered and adjudged that the Sheriff of Yamhill County, Oregon, sell all of the right, title and interest which

the said defendants had in the above described real property on October 19, 1921, and since said date, to satisfy the said plaintiff's demands and judgment:

And it further appearing that based on said judgment, an execution was duly issued out of the above entitled court in the above entitled cause on June 28, 1922, directing the said Sheriff to sell the above described real property in the manner prescribed by law; and that thereupon and thereafter the said Sheriff levied upon said real property by virtue of said execution and duly advertised the time and place of said sale in the News-Reporter, a newspaper of general circulation published at McMinnville, Oregon, which publication was had once a week for four consecutive weeks prior to August 7, 1922, and which notice contained a specific and correct description of real property to be sold and the time and place of the proposed sale, all of which is shown by the affidavit of the printer of said paper on file with the Clerk of this court; and that in addition, the said Sheriff posted the same notices in three public places in Yamhill County, Oregon, to-wit: One upon the bulletin board at the front door of the court house at McMinnville, Oregon; one at the front door of the garage of Henderson and Houser on Bridge Street in Sheridan, Oregon, and the third notice on the front door of the garage of Calkins & Son on First Street in Newberg, Oregon, all of which said notices were kept posted for four consecutive weeks immediately prior to

August 7, 1922, and which notices states the time and place of sale, the purpose of sale, and contained a specific description of the property to be sold and were identical with the notices published in said newspaper.

And it further appearing that on August 7, 1922, at the hour of ten o'clock A. M., at the front door of the court house at McMinnville, Oregon, the said Sheriff offered said real property for sale, and for want of bidders, he by public proclamation postponed the said sale for one week, at the same hour and place; and thereupon on August 14, 1922, at the hour of ten o'clock A. M. at the front door of the Court House at McMinnville, Oregon, the said Sheriff again offered said real property for sale, and because there was no bidder therefor, again postponed the said sale until August 21, 1922, at the same hour and place, and at said hour and place, the said Sheriff again offered said property for sale, and as there was no bidder therefor, postponed the said sale until August 28, 1922, at the said hour and at the same place; and on said August 28, 1922, at the front door of the Court House at McMinnville, Oregon, and at the hour of ten o'clock A. M. the said real property was offered for sale at public sale, and thereupon D. M. Nayberger bid for said real property the sum of Seven Hundred Thirty-nine and 15-100 (\$739.15) Dollars; that the said bid of said D. M. Nayberger was the highest and best sum bid for said real property and the highest and best bid offered therefor and there was

no other bidder for the same or any part thereof. That said real property was offered first in separate parcels, and there being no bidder for either parcel, the same was offered for sale in one parcel, and thereup the said sum was bid for said real property and the whole thereof by the said D. M. Nayberger. That the return of the Sheriff of Yamhill County, Oregon of and concerning said sale was duly filed with the Clerk of the above entitled court immediately after the holding thereof, and although said sale was had on said August 28, 1922, more than five months prior to this date, there has been no objections made or offered to the confirmation of said sale.

And it further appearing that said sale was had and held in all respects as required by the statutes of this state and the rules of this court, and there were no irregularities in connection with the sale of said real property, and no greater sum could be had or obtained for said real property by a resale thereof.

It is at this time by the court Ordered and Adjudged that the sale of the above described real property to the said D. M. Nayberger be and the same is hereby confirmed and approved.

Dated this 10th day of February, 1923.

H. H. BELT,

) Judge.

Recorded Vol. 15, page 207, Circuit Court Journal for Yamhill County, Oregon.

Filed February 10, 1923. Elijah Corbett, Clerk.
By F. L. Osterman, Deputy.

EXHIBIT XIV.

SHERIFF'S CERTIFICATE OF SALE.

This is to Certify, That by virtue of an execution issued out of the Circuit Court of the State of Oregon, for the County of Yamhill, bearing date the 28th day of June, 1922, to me directed, upon and to enforce a Judgment and Decree rendered in said Court on the 3rd day of June, 1922, in favor of D. M. Nayberger, Plaintiff, and against Harry J. Breneman and Edith Breneman, his wife, Defendants, and which said writ of execution was received by me on the 28th day of June, 1922, I levied on all the said Defendants' interest of, in or to the following Real Estate, lying and being in Yamhill County, State of Oregon, known and described as follows, to-wit:

Commencing at a point 22.785 chains West of the Southeast corner of the S. F. Staggs and Minerva J. Staggs D. L. C. Not. No. 1211, Claim No. 55 in T. 4, S. R. 4 W. of the Will. Mer., and running thence West 7.51 chains; thence North 13 1-3 chains; thence East 7:51 chains; thence South 13 1-3 chains to the place of beginning, and containing 10 acres.

Also: The West half of the "South Park Sub-division," the same being a sub-division in the above named and numbered D. L. C. of S. F. Staggs and wife, containing 12½ acres of land, as the same appears upon the duly recorded plat of said sub-division now of record in the office of the Recorder of Conveyances in and for said County and State.

And after duly advertising the same, as required by law, by posting printed notices of the time and place of the sale thereof, in three public places in said County for four successive weeks previous to the day of sale, and by publishing the same in the News-Reporter, a newspaper of general circulation published in said County and State, once each week for the same time, by all of which said notices and publications the said premises were advertised to be sold at public auction, at the Court House door, in said State and County, to the highest bidder therefor, on the 7th day of August, 1922, at the hour of 10 o'clock A. M.

On the 28th day of August, 1922, at the hour of 10 o'clock A. M., at the Court House door, in said County and State, I sold at public auction, to D. M. Nayberger, for the sum of Seven Hundred Thirty-nine and 15-100 (\$739.15) Dollars, D. M. Nayberger being the highest bidder and that being the highest sum bidden therefor, and the whole of the said premises so sold, as aforesaid, being the smallest portion thereof for which anyone at the said sale bid a sum sufficient to satisfy said execution, interest and costs. That the said sale was made subject to redemption, but will become absolute, and the said purchaser will be entitled to a deed therefor, from me, as Sheriff, at the expiration of one year from the day when said sale shall be confirmed by said Court, unless the same shall be sooner redeemed according to law.

F. B. FERGUSON,
Sheriff of Yamhill County, Oregon.

State of Oregon,
County of Yamhill,—ss.

I, H. S. Maloney, Recorder of Conveyances in and for said county and state, do hereby certify that the within instrument of writing was received and filed, and has been by me duly recorded at page 543 of Vol. 86 of the Deed Records for said county on this 12th day of October, A. D. 1922, at 9:45 o'clock A. M.

In testimony whereof I have hereto subscribed my name and affixed my official seal.

[Seal]

H. S. MALONEY,
Recorder.

CERTIFICATE OF CLERK OF THE CIRCUIT
COURT OF THE COUNTY OF YAM-
HILL, STATE OF OREGON.

State of Oregon,
County of Yamhill,—ss.

I, Elijah Corbett, Clerk of the Circuit Court of the County of Yamhill and State of Oregon, do hereby certify that the foregoing copies of complaint, Certificate of Attachment, Plea in Abatement, Demurrer, Order, Default, Judgment, Sheriff's Return of Sale of Real Property, Notice of Sheriff's Sale on Execution, Declaration of Homestead, Order of Confirmation of Sale, and Sheriff's Certificate have been by me compared with the original, and that they are correct transcripts there-

from and of the whole of such original papers as above mentioned, as the same appear at my office and in my custody and of record.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this. 14. day of *October*, A.D. 1924.

[Seal]

..*Elijah Corbett*.....

Clerk of the Circuit Court.

By.....Deputy.

EXHIBIT XV.

SHERIFF'S DEED TO NAYBERGER

This Indenture, made the 13th day of February, 1924, between F. B. Ferguson, as Sheriff of the County of Yamhill, State of Oregon, the party of the first part, and D. M. Nayberger, of the County of Yamhill, Oregon, the party of the second part,

Witnesseth, that whereas, by virtue of an Execution and Order of Sale duly issued out of and under the seal of the Circuit Court of the State of Oregon, for the said County of Yamhill, dated the 28th day of June, 1922, upon a judgment duly made and rendered in the said Court on the 3rd day of June, 1922, in an action in which said D. M. Nayberger was Plaintiff, and Harry J. Breneman and Edith Breneman, his wife, were defendants, to the Sheriff of said County directed and delivered, commanding him to make sale of the real property hereinafter described and conveyed, and in said Execution specified.

And whereas, in obedience to said command, and under and by virtue of said Execution, the said Sheriff did levy on, seize, and take all the lands, tenements and real estate which the said defendants, the judgment debtors (or any of them) had in and to the said premises hereinafter particularly set forth, described and conveyed, with the appurtenances, and did, on the 7th day of August, 1922, sell all the right, title, interest and claim of the said defendants in said suit in and to the said premises, at public auction, at the Court House door, in said County of Yamhill, State of Oregon, between the hours of nine in the morning and four in the afternoon of that day, namely, at ten o'clock, A. M., after having first given due notice of the time and place of said sale according to law, to-wit: By posting notices of the time and place of sale, particularly describing the property, for four weeks successively prior to the day of sale, in three of the most public places in the said County of Yamhill, and also by publishing a copy of such notice once each week for four successive weeks prior to the said sale in the News-Reporter, a weekly newspaper of general circulation printed and published in Yamhill County, Oregon, at which sale all the right, title, interest and claim of the said defendants (or any of them) in and to the said premises were struck off and sold to D. M. Nayberger, for the sum of Seven Hundred Thirty-nine and 15-100 (\$739.15) Dollars, he being the highest bidder, and that being the highest sum bidden therefor.

And Whereas, the said Sheriff, after receiving from the said purchaser the said sum of money bid as aforesaid, gave to the said purchaser such certificate of said sale as is by law directed to be given, and the matters contained in such certificate were substantially stated in said Sheriff's return of his proceedings upon said Execution and Order of Sale to the Clerk of the Circuit Court of the County of Yamhill, State of Oregon.

And Whereas, the said Court, by an order made the 10th day of February, 1923, duly confirmed said sale, and more than twelve months have expired since the confirmation of said sale by the Court without any redemption of the said premises having been made.

Now, Therefore, This Indenture Witnesseth: That I, F. B. Ferguson, Sheriff of the said County of Yamhill, by virtue of said Execution and Order of Sale, and in pursuance of the statute in such cases made and provided, for and in consideration of the said sum of money in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, conveyed and confirmed, and by these presents do grant, bargain, sell, convey and confirm unto the said party of the second part, and to his heirs and assigns forever, all the right, title, interest and claim which the said defendants in said suit (or any of them) had on the 3rd day of June, 1922, or any time afterwards, or now have in or to all these certain lots, pieces or parcels of land, situate, lying

and being in the said County of Yamhill, State of Oregon, and more particularly described as follows, to-wit:

Commencing at a point 22.785 chains West of the Southeast corner of the S. F. Staggs and Minerva J. Staggs D. L. C. Not. No. 1211, Claim No. 55 in T. 4, S. R. 4 W. of the Will. Mer., and running thence West 7.51 chains; thence North 13 1-3 chains; thence East 7.51 chains; thence South 13 1-3 chains to the place of beginning, and containing 10 acres.

Also: The West half of the "South Park Sub-Division," the same being a sub-division in the above named and numbered D. L. C. of S. F. Staggs and wife, containing 12½ acres of land, as the same appears upon the duly recorded plat of said subdivisions now of record in the office of the Recorder of Conveyances in and for said County and State.

[U. S. Internal Revenue Stamp \$1.00.]

Together with all and singular the hereditaments and appurtenances thereto belonging or in anywise appertaining.

To Have and to Hold the said premises, with the appurtenances, unto the said party of the second part, his heirs and assigns forever, free from all claim thereon upon the part of said defendants or any of them, and as fully and absolutely as by law the said party of the second part can or ought to have or to hold the same hereunder.

In Witness Whereof, I, the said Sheriff, have

hereunto set my hand and seal the day and year first above written.

Done in the Presence of:

M. F. Corrigan

Anna Nissen.

F. B. FERGUSON,

[Seal] Sheriff of Yamhill County, Oregon.

State of Oregon,

County of Yamhill,—ss.

On this, the 13th day of February, 1924, before me, a County Clerk within and for said County of Yamhill, personally came the within named, F. B. Ferguson, Sheriff of the said County of Yamhill, State of Oregon, known to me to be the identical party described in and who, as such Sheriff, executed the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and seal the day and year in this certificate first above written.

ELIJAH CORBETT,

County Clerk, Yamhill County.

[Yamhill County Court Seal]

State of Oregon,

County of Yamhill,—ss.

I, H. S. Maloney, Recorder of Conveyances in and for said County and State, do hereby certify that the foregoing copy of Sheriff's Deed has been by

me compared with the original deed and that it is a correct transcript therefrom and of the whole of such original Sheriff's Deed, and that the original deed was received and filed and has been by me duly recorded in Yamhill County Records at page 377, Book of Deeds, Vol. 89, on the 15th day of February, 1924, at 2:10 P. M.

In Testimony Whereof I have hereto subscribed my name and affixed my official seal this..14..th. day of..October... 1924.

.....H. S. Maloney.....

Recorder of Conveyances.

By E. M. Hutchens - Deputy

[Seal]

**United States Circuit Court
of Appeals
for the Ninth Circuit**

In the Matter of H. J. BRENEMAN,
Bankrupt.

H. J. BRENEMAN,
Petitioner,

vs.

M. F. CORRIGAN, as Trustee in
Bankruptcy of the Estate of
H. J. BRENEMAN, Bankrupt,
Respondent.

**BRIEF IN SUPPORT OF MOTION TO DISMISS
PETITION FOR REVISION**

STATEMENT

H. J. Breneman was adjudicated a bankrupt on the 22nd of September, 1921. His debts amounted to \$4059.00, and his assets, outside of a certain piece of real property, brought into the estate for payment of bankruptcy expenses and distribution among his creditors the sum of \$986.50. His prin-

cipal and practically his only asset consisted of whatever interest he had in the real estate. He resisted the trustee's right to administer upon the real estate on the ground that the property had been conveyed to him and his wife by a common grantor, and consisted of an estate by the entirety, and that, therefore, the trustee in bankruptcy had no interest in such an estate by the adjudication of one of the spouses only as a bankrupt.

A debt for family expenses and for which, under the Oregon law, the property of the husband and wife is chargeable, had previously been contracted with one D. M. Nayberger.

On the 19th of October, 1921, Nayberger started an action for the recovery of the sum of \$695.99 due him. This action was brought in the Circuit Court of the State of Oregon, for Yamhill County, against Breneman and wife, and it is alleged in the complaint that they are tenants by the entirety of the real estate in question. The prayer of the complaint asks that the property be sold for the satisfaction of this joint debt. The husband and wife appeared in the proceedings and filed a plea in abatement, praying that the action be abated by reason of the adjudication of the husband as a bankrupt. A demurrer to this plea in abatement was interposed and was sustained by the Court.

On the 18th day of June, 1922, the defendants having refused to move or plead further in the

action, a judgment was entered in favor of Nayerger and against the defendants, and the real property was ordered sold.

From the record it appears that the Sheriff postponed the sale a number of times, and that there was a statement filed with the Sheriff by the husband reciting that he was the head of a family; that the property was in his and his wife's name; that there was a contract for a life estate held by one Allison who was then 68 years of age; that his expectancy, according to the mortality table, was 9.48, and that he was entitled to \$265.14 per year; that it was impossible to ascertain the true value of the property, but that it was valued at about \$7,000; that the interest is held by Edith Breneman and the bankrupt, and that the bankrupt's interest does not exceed the sum of \$3000, and that all of the property was claimed as a homestead. The wife made no claim, nor did the husband and wife as a unity make any claim, nor was anything further done in the proceedings by either the husband or the wife. No homestead exemption was ever allowed, nor was any part of the property allocated or reserved for exemption purposes. The property was sold free of exemptions to the judgment creditor on the 28th day of August, 1922. The judgment creditor did not ask to have the sale confirmed until the 10th day of February, 1923. This sale might have been confirmed under the Oregon law any time after five days from the sale.

No objection was made to the confirmation of the sale.

Under the Oregon law it is from this date that the judgment debtor has a right within one year to redeem the property. The property was not redeemed, and it appears from the affidavit of the trustee filed in support of this motion and from the files of the bankruptcy court that the status of the property with respect to the Nayberger claim was called to the attention of the Referee before whom the bankruptcy proceedings were pending. The referee thereupon made an order authorizing the trustee from his own funds to redeem or otherwise acquire the Nayberger title. It was not until the wife filed a petition in bankruptcy and was adjudicated a bankrupt and the Court held that the trustee was then entitled to the possession of the real property, that the husband pressed his claim for the allowance of an exemption in the Bankruptcy Court, and it was not until after the 22nd day of January, 1924, being the date when the Referee made his order denying a homestead exemption to Breneman, and also after the trustee had acquired the Nayberger title, that proceedings to review the Referee's order concerning the exemption were instituted. The truth is the property was abandoned as a homestead by Breneman and his family almost two years previously. Taxes have been allowed to accumulate against the property, and the property has been allowed to run down, and the residences of both the husband

and wife, bankrupts, have been changed, and they have accepted employment in other localities. The petition for revision was filed in this Court on the 16th day of May, 1924, or almost twenty-nine months since Breneman was adjudicated a bankrupt.

It is contended by the Trustee:

(a) That the property has been sold free of homestead claims under the Nayberger judgment, and that such title as the Trustee may now have comes to him through Nayberger and wife, rather than through the bankruptcy proceedings;

(b) That the homestead, if any there existed on the part of the husband and wife, bankrupts, has been abandoned by them;

(c) That this petition for revision has been filed for the purposes of delay only.

Any controversy there may have been between the parties has been settled and the proceedings in this court are of a fictitious nature. In these proceedings there is purely a moot question as to whether or not one of the spouses as a tenant by the entirety can claim a homestead in an entirety estate under the Oregon law.

ARGUMENT

Whenever it is brought to the attention of the Appellate Court that there is merely a moot or academic question to be decided, or that there is no real merit in the controversy, or that the controversy has been settled or determined, or that

the judgment of the Appellate Court as rendered can not be carried into effect, **the proceedings should be dismissed.**

In the case of Lawrence P. Mills, Appellant, vs. Briggs Green, 159 U. S. 651, 16 S. C. 132, 40 L. Ed. 293, Mr. Justice Gray, speaking for the Court said,

“The attitude of this court as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect and not to give opinions upon moot questions or abstract propositions, or to declare principals or rules of law which can not affect the matter in issue in the case before it.”

The Court then reviews a number of cases in which appeals have been dismissed and cites the case of Washington Market vs. District of Columbia, 137 U. S. 62, 34 L. Ed. 572, under the following comment:

“Where, pending an appeal from a decree dismissing a bill to restrain a sale of property of the plaintiff under assessments for streets improvements and to cancel tax lien certificates, the assessments and certificates were quashed and annulled **by a judgment in another suit**, the appeal was dismissed without costs to either party.”

The court holds that it is proper to bring to the attention of the Appellate Court by extrinsic evidence the true nature of the proceedings, and decided:

“It is obvious, therefore, that if the bill could properly be held to present a case within the jurisdiction of the Circuit Court, no relief within the scope of the bill could now be granted.”

It does not require a citation of extensive authorities in support of a proposition as well recognized in appellate procedure as this one is. We will therefore direct our inquiry to the real nature of these proceedings.

The property and pecuniary rights of every married woman at the time of marriage or afterwards acquired by gift, devise or inheritance, shall not be subject to the debts or contracts of the husband, and laws shall be passed providing for the registration of the wife's separate property.

Article 15 Sec. 5, Constitution of Oregon.

The expenses of the family and the education of the children are chargeable upon the property of both husband and wife, or by either of them, and in relation thereto they may be sued jointly or separately. Sec. 9748 Oregon Laws.

It is alleged in the Nayberger complaint that the debt sued for was a family expense and the items comprising this expense were generally enumerated. Under the laws of Oregon, the claim of Nayberger was therefore a charge upon the lands of both the husband and the wife.

The Circuit Court of the State of Oregon had jurisdiction of the subject matter of the action and

the parties thereto and proceeded to a determination of the controversy before it. This controversy resulted in a judgment in favor of Nayberger and a subsequent sale of lands in accordance with the prayer of the complaint and a subsequent issue of deed to Nayberger.

The interest, whatever it might be, which was acquired by the trustee through the bankruptcy proceedings of Breneman, did not divest joint creditors of the husband and wife of their remedies.

It is conceded in these proceedings that estates by the entirety are recognized in Oregon in all of their common law significance **except perhaps insofar as the common law may be qualified by the Married Woman's Property Act.**

Noblitt vs. Beebe, 23 Ore. 4; 35 Pac. 248.

Howell vs. Folsom, 38 Ore. 184, 63 Pac. 116.

Hayes vs. Horton, 46 Ore. 597, 81 Pac. 386.

An estate by the entirety is an estate held by husband and wife together so long as both live, and after the death of either by the survivor, so long as the estate lasts. It is not an ordinary joint tenancy or a tenancy in common. 13 R. C. L. Sec. 121, Page 1096.

While it has been held in Oregon that one tenant may mortgage his interest in an estate by the entirety (Hayes vs. Horton, 46 Ore. 597, 81 Pac. 386) there is no decision defining just what this interest is. In fact, Chief Justice Moore in the case of Oliver vs. Wright et al, 47 Ore. 322, 83 Pac 872,

specifically refrained from stating whether or not a lien by way of attachment issued by a creditor of one of the spouses was a valid lien. He stated that it was unnecessary to decide whether the interest that a husband had in an estate by the entirety was "property" within the meaning of the Oregon law. He decided in this case, however, that when the right of survivorship was determined, a judgment previously obtained by a creditor against the surviving spouse became effective at the instance of the death of the other spouse.

Section 70 (5) of the Bankruptcy Act provides that the trustee of a bankruptcy shall be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt to all property which prior to the filing of a petition he could by any means have transferred or which might have been levied upon or sold under judicial process against him.

By virtue of the decision of the Supreme Court of Oregon holding that one spouse may mortgage his interest in an estate by the entirety it would seem to follow that some interest, by virtue of this section of the Bankruptcy Act, would pass to the trustee in bankruptcy as being property which prior to the filing of the petition the bankrupt could have transferred. Whatever this interest may be it is subject to the following expectancies and contingencies:

- 1st. The entirety estate must exist up until the

time of death of one of the spouses and the right of survivorship determined.

2nd. The interest is lost if both spouses by their voluntary act alienate the estate subsequently to the bankruptcy of one of the spouses, and

3rd. The interest of the trustee is also lost if subsequently to the bankruptcy of one of the spouses there is an involuntary alienation by operation of law by joint creditors of the husband and wife sequestering the property for the payment of their joint claims.

To put the proposition conversely: the only interest the trustee acquires by the bankruptcy of one of the spouses is the expectancy that the bankrupt spouse will survive the other spouse, and that in the meantime the estate will not be destroyed by the joint act of both of the spouses or taken from them by the act of joint creditors.

In many cases the courts have defined what such an interest a trustee in bankruptcy of one of the spouses is. As an example, it has been held that after the bankruptcy of one of the spouses the trustee is not a tenant in common or even a joint tenant with the other spouse.

In the case of *McCurdie vs. Cannin*, 64 Pa. St. 39, the court, in discussing the subject in view of the Married Woman's Property Act, said:

“The case therefore stands thus. Here is a married woman who is neither a joint tenant, nor a tenant in common with the husband, but who is seized of the whole estate, and with him entitled to possession of the whole. If a

purchaser of the husband's interests may be put into possession with her what follows? This:

1st. You have destroyed her estate and turned her entirely into a joint tenancy or a tenancy in common.

2nd. You have deprived her altogether of possession, because it is not in the nature of things that she can enjoy actual possession with a stranger as she did with her husband.

3rd. You take away her property without her consent and destroy her rights, which were protected by the Act of April 11th, 1848. She was entitled to possession of the whole with her husband. You propose to give possession of the whole with a stranger, a possession which she can not, and which he probably would not enjoy.

It should be answered that the property may be rented, and a moiety of the lands and profits may be paid to her, that is only to say that you may deprive her of the estate and give her another of inferior value, a substitution which you have no right to propose, the words of the Act of 1848 are of so comprehensive a character and its purpose to protect every possible interest of the wife is so plain that we can not, by any possible construction consistent with the object of the legislature and the language which they have used, except this interest from its protection."

It has been held that a husband and wife may join in a conveyance subsequent to the bankruptcy of the husband so as to give title to lands held by the entirety to a third party, free of the trustee's interests. Speaking on this subject the Court in the case of *in re Ernest H. Beihl*, 197 Fed. 870 (Pa.) said:

“This ‘venerable and unique common-law estate’—to use Mr. Justice Stewart’s phrase—is founded upon the conviction that husband and wife are one person and not two, but it is nevertheless conceived of as giving the entire interest in the whole property, not to the two jointly, but simultaneously to each, and as giving it without possibility of severance. **These completely interfused interests can not be divided by partition; neither owner can dispose of it except as a whole, and neither can dispose of it without the concurrence of the other.** But, from another point of view, each has only an expectancy, for, upon the death of one, the other takes the whole in severalty, not by survivorship, but by the original title. Of course it is possible to reason about such a perplexing abstraction, and rules have been gradually evolved to govern the necessarily conflicting interests that are thus compelled to live together without the possibility of divorce. But, as may be supposed, while these rules may be the result of reasoning in forms of the syllogism, they are apt to be artificial and some-

times they lead to a contradiction in terms. For example, each of these curious tenants owns what may be a valuable interest, but can not exercise the most distinctive characteristics of ownership—the power of disposition. The husband owns the entire estate, but so does the wife, and therefore if he should be permitted to sell it he would be selling her property. Nor may he encumber it, except contingently—since incumbrance may be the first step to a sale, and this would be to pledge her property to his creditors. Nor may his creditors seize it by any process of the law, for she owns it all, and, unless he survives her, it will never be either at his disposal or at theirs. And this catalog of difficulties could easily be extended, if it were necessary to exhibit more plainly the peculiar structure that has been built on the foundation of pure fiction It is clear I think from the foregoing remarks that the trustee has never been actually or constructively in possession of the estate in controversy, and not being Mrs. Beihl's husband, he has no present right to the possession and can not have. But—and this is the sufficient reason for denying the petition—he is already clothed with all the interest the bankrupt could have conveyed to him at the date of the adjudication, and a restraining order now would therefore be superfluous. Whatever title the bankrupt had then has already passed from

him by operation of law, and—on his own account, and for his own benefit—he has no longer anything to convey.”

This was a proceeding brought to restrain the bankrupt from joining in a conveyance with his wife to convey the entirety estate to a third party. The Supreme Court of Pennsylvania in the same matter had previously held that the deed from the husband and wife was sufficient to pass title free from the effect of the bankruptcy proceedings and free from any contingent interest or ownership therein by the trustee in bankruptcy in the event of the bankrupt surviving his wife. The trustee in bankruptcy thereupon brought petition in the United States Court setting forth the proceedings in the State Courts, and avering that although it might be the law of Pennsylvania that the bankrupt by joining in a deed with his wife could convey an absolute title to the purchaser free from any claim by the bankrupt in case he survived his wife, yet, nevertheless, the court had jurisdiction to restrain the bankrupt from executing any such deed, or in any manner attempting to convey his right and title in properties which passed to the trustee in bankruptcy. The U. S. District Court refused to grant the injunction.

To the same effect is the case of *Jordan vs. Reynolds et al*, 105 Md. 288, wherein the court held that a judgment creditor of one of the spouses has no such lien upon the property which had subsequently been conveyed by both of the spouses to a third party so as to prevent both of the spouses

from giving a good and merchantable title to such third party, free and clear of the outstanding judgment against the one spouse.

Referring further to Sec. 70 (a) of the Bankruptcy Act, it will be found that the trustee is vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, **except insofar as it is to property which is exempt.** Therefore title to exempt property does not pass to the trustee. Further, in severing exempt property from the general assets of a bankrupt estate it is the duty of the bankruptcy court to follow the state laws and decisions under which the exemption is claimed. Collier on Bankruptcy, 13th Ed., Vol 2, page 1744.

It follows that Nayberger had a right to pursue his remedies against the property as a joint creditor of the husband and wife, independent of and irrespective of the bankruptcy proceedings. The State Court has fully determined the matter of exemptions and its proceedings are no longer subject to collateral attack.

In Oregon property entitled to homestead exemption is merely exempt from sale as distinguished from being exempt from attachment or levy.

A homestead shall be exempt **from sale or execution** from the lien of every judgment and from liability in any form for the debts of the owner to the amount and value of \$3000 . . . Section 221 Oregon Laws.

If an attachment or levy is made on property which might be declared as a homestead the levy may be enforced and the property sold whenever the property may lose the characteristics of a homestead, such as by abandonment. In the case of *Davis vs. Lowe et al*, 66 Ore. 599, 135 Pac. 314-315, Judge Eakin, speaking for the court, said:

“The exemption, however, may be waived or relinquished by abandonment of the homestead, or by a conveyance, as held in *Hanson vs. Jones*, 57 Ore. 416, 109 Pac. 868, where the law is held to be only an exemption from attachment and judicial sale. **Therefore a creditor may, if the debtor is otherwise liable for the debt, reduce his claim to judgment and have it entered upon the judgment docket, and if the homestead be abandoned or lost in any way the property will be subject to levy and sold.**”

From the affidavit of the trustee it will be noted that the bankrupt soon after the filing of the petition in bankruptcy abandoned the property and soon thereafter his wife abandoned the property, and each of them obtained separate employment in different localities, and each of them did remove all of their personal belongings from the property, and neither of them, nor their families, have made their home in the property, and the house had been allowed to run down, the lands have not been cultivated, and the property has become subject to the payment of various State taxes.

Section 221 Oregon Laws before referred to contains the following specific provision:

The homestead must be the actual abode of and occupied by the owner, his or her spouse, parents or child.

So far as the proceedings in either the State Court or the Bankruptcy Court are concerned, this property has been abandoned, and even if it should be held that one of the tenants of an estate by the entirety may claim a homestead exemption in the whole entirety estate, nevertheless that exemption can not be claimed unless the property is the actual abode of the owner **and continues as such.**

It will be noted in the Nayberger proceedings there was no mention made in the claim that was attempted to be submitted therein, that the property was the actual abode of any one. In fact, the property was actually abandoned at the time this claim was filed. However, under the Oregon decisions, if this were not the fact a subsequent abandonment thereof would give Nayberger the right to have the property sold in satisfaction of his judgment. It therefore follows that insofar as the State court is concerned, and that is the law which the Federal Court will follow, this property has been sold free of homestead exemptions.

It will also be noted in the Nayberger case the husband only attempted to claim the homestead exemption.

It has been held in the case of Sharp et al vs. Baker, 51 Ind. 547, 99 N. E. 46, that

“A tenant by entirety has no separate interest for property in the entirety estate which can be claimed as exempt. The right of an execution defendant to claim property as exempt extends only to property in which he has an individual interest. For this reason it has been held that a partner can not claim an exemption in the partnership property.”

The bankruptcy law contemplates the bankrupt's estate shall be administered with all convenient dispatch, so that the property may be distributed among the creditors, and the bankrupt discharged from his debts and to that end parties litigant shall be alert and active to protect their rights and to proceed with promptness in asserting the same.

Blanchard et al vs. Ammon et al, Circuit Court of Appeals, 9th Circuit, 183, Fed. 556, 25 A. B. R. 594.

We would review before the Court the delays which the bankrupt has brought about in these proceedings.

The adjudication was made on the 21st day of September, 1921, Nayberger brought an action against the bankrupt and wife on the 19th day of October, 1921. On the 27th of October, 1921, he filed his plea in abatement to the Nayberger complaint, which was overruled on the 28th of May, 1922. Judgment was not entered until the 3rd day of June, 1922, and the property was advertised for sale under this judgment for August 7, 1922. The

sale was postponed until August 14, 1922. The sale was then postponed until August 21, 1922. It was then postponed until August 28, 1922. No objection of any kind was made to the sale although order confirming the sale was not entered until the 10th of February, 1923. A year then elapsed and nothing further was done until Sheriff's deed was issued to Nayberger on the 13th day of February, 1924. It is quite apparent that the property and such value as it had would have then been lost to everyone had not the trustee seen fit to advance from his own funds sufficient money to acquire the Nayberger title. He was able to do this and receive deed to himself and Nayberger and wife on the 13th of February, 1924. The United States District Court of Oregon entered its order sustaining the decision of the referee previously rendered, permitting the sale of the property free of liens, and denying the homestead exemptions, on the 2nd day of April, 1924, and it was not until the 16th day of May, 1924, that the bankrupt filed his petition for revision. If it be true, the fact that bankruptcy proceedings are to be expeditiously handled, it is difficult to see how these delays can be countenanced. It is significant to note that after all of these delays and after a determination of the matter at issue here in the State court, and after the bankrupt has seen that the trustee has acquired the Nayberger title, that he is attempting to use this Court to give to him a remedy which, if he ever had, he has lost.

In the case of Blanchard et al vs. Ammons last referred to, this Court said:

“There is no time fixed in the bankruptcy act within which a petition for revision shall be presented, but it is the acknowledged rule that it must be presented within a reasonable time. An appeal from the adjudication in bankruptcy is required to be taken within ten days and by analogy it would seem that a petition for revision of the adjudication of bankruptcy ought to be taken within a similar time unless there are circumstances excusing the delay.”

Considerable more than ten days had elapsed since the order of the District Court was signed and before the petition for a review was filed. It is true that it was held **at that time**, that it had been generally held that a petition for revision must be had within six months. Since the holding in that case, however, a number of courts have passed rules making it obligatory to file petitions for review within the time provided for appeals, that is, ten days. Section 25 (a) of the Bankruptcy Act limits the time for filing appeals in bankruptcy cases to ten days, and it has now generally been held by analogy that the time for filing a review should be limited to ten days. In re. Friend, 134 Fed. 739, Circuit Court of Appeals of Illinois, re Bannerscope, 223 Fed. 53 Circuit Court of Appeals, N. Y. At least there is no showing made or circumstances to

be found from the record to excuse the delay in this case.

CONCLUSION

The matter in controversy here has fully been determined and decided in the State Courts of Oregon. The homestead, if any there existed, has been abandoned. The bankrupt has waived any rights he may have had, and there is now no real controversy involving real and substantial rights of the parties to the record, and no subject matter upon which the judgment of this court can operate. To give the bankrupt an exemption now in the property would be to give him something which he has given away through the Nayberger case.

Respectfully submitted,

.....*Wm. B. Taylor*.....

Attorneys for Respondent and
Trustee in Bankruptcy.

State of Oregon }
County of Multnomah } ss

The undersigned, of attorneys for Trustee
of said County and Trustee, upon the filing
of said Motion and Brief
do hereby solemnly swear that the
digital document, hereinafter set forth, is a correct
and true transcript of the original document.

Portland, Oregon, this October 14 1924

W. B. Gayton